90-1604

Supreme Court, U.S.
FILED
APR 16 1991
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.,*
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:
DAN MORALES
Attorney General of Texas
WILL PRYOR
First Assistant Attorney General
MARY F. KELLER
Executive Assistant Attorney General

Counsel of Record:
STEPHEN GARDNER
Assistant Attorney General
Office of the Attorney General
714 Jackson St., Ste. 700
Dallas, Texas 75202
214/742-9698

QUESTION PRESENTED

Can airlines falsely advertise air fares in Texas, in total disregard of state law prohibitions, merely because the federal government has pre-emptive regulatory authority over an airline's "rates, routes, or services" under the Federal Aviation Act?

LIST OF PARTIES

This petition is filed by Texas Attorney General Dan Morales.[1] In addition to Texas, 33 state attorneys general were defendants in the proceedings below.[2] Texas anticipates that some or all of these states will petition the Court separately for a writ of certiorari on questions in which Texas does not have a formal interest.

The plaintiffs/appellees below were Trans World Airlines, Inc.; Continental Airlines, Inc.; British Airways PLC; Air Canada; Compagnie Nationale Air France; Alitalia-Linee Aeree Italiane, S.p.A.; El Al Israel Airlines Ltd.; Finnair; Lufthansa German Airlines; Japan Air Lines Company, Ltd.; Qantas Airways Ltd.; Scandinavian Airlines System; Viacao Aerea Rio-Grandense (VARIG); and Pan American World Airways, Inc. All 14 of these parties below are respondents to this petition.[3]

---

1 Petitioner will be referred to herein as "Texas."

2 These are the Attorneys General of the States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

3 These 14 respondents will be jointly referred to as "airlines" or "respondents."

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 20

APPENDIX

TABLE OF AUTHORITIES

PAGE

CASES

Alaska v. U.S. Department of Transportation, 868 F.2d 441 (D.C. Cir. 1989) 8

In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 635 F.2d 67 (2d Cir. 1980) 8

Air Transport Ass'n of America v. Public Utilities Commission of California, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988) 9

Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988) 8

California v. American Stores Co., 110 S.Ct. 1853 (1990) 19

California v. ARC American Corp., 109 S.Ct. 1661 (1989) 19

California v. Federal Energy Regulatory Comm'n, 110 S.Ct. 2024 (1990) 14

English v. General Electric Co., 110 S.Ct. 2270 (1990) 19

FMC Corp. v. Holliday, 111 S.Ct. 403 (1990) 18

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 14

PAGE

French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989) 8

Friedman v. Rogers, 440 U.S. 1 (1979) 14

Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984) 9

Illinois Corporate Travel, Inc. v. American Airlines, Inc., 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990) 8

Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478 (1990) 19

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) 16, 17, 18

New York ex rel. Abrams v. Trans World Airlines, Inc., 728 F.Supp. 162 (S.D.N.Y. 1990) 15

People v. Western Airlines, Inc., 155 Cal. App. 3d 597, 202 Cal. Rptr. 237 (Cal. Ct. App. 1984), *appeal denied* (Cal. Sup. 1984), *cert. denied*, 469 U.S. 1132 (1985) 9

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 14

Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990) ..... *passim*

West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1990) 14, 15

STATUTES

15 U.S.C. § 1334(b) 17

49 U.S.C. § 1302(a)(3) 10

49 U.S.C. § 1302(a)(5) 10

49 U.S.C. § 1305(a)(1) 10

49 U.S.C. § 1381(a) 16

49 U.S.C. § 1506 17

49 U.S.C. § 1551(a)(2)(A) 10

TEX. BUS. & COM. CODE § 17.46(a) 11

TEX. BUS. & COM. CODE § 17.46(b)(9) 11

TEX. BUS. & COM. CODE § 17.46(b)(11) 11

LEGISLATIVE MATERIALS

123 CONG. REC. 30595 (Sept. 23, 1977) 10

1978 U.S. CODE CONG. & ADMIN. NEWS 3737 10

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Dan Morales, Attorney General of Texas,[4] respectfully prays that the Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth

---

[4] At the time the lawsuit was filed, the Texas Attorney General was Jim Mattox. On January 1, 1991, Attorney General Mattox left office and current Attorney General Dan Morales assumed office. Since the injunction was directed at the Attorney General in his official capacity, the current Attorney General of Texas has been substituted as petitioner pursuant to Rule 35.3 of the Rules of this Court and Rule 43(c)(1) of the Federal Rules of Appellate Procedure.

Circuit, entered in the above-entitled proceeding on January 18, 1991.

OPINIONS BELOW

The January 18, 1991, opinion of the United States Court of Appeals for the Fifth Circuit is reprinted at Appendix, *infra*, p. 1a. The Fifth Circuit determined that the opinion should not be published, and it is therefore unreported.

This case has been the subject of a prior appeal, from the district court's issuance of a preliminary injunction. The court of appeals affirmed the issuance of that preliminary injunction on April 3, 1990. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990); Appendix, *infra*, p. 13a. After the court of appeals issued its prior opinion, the district court entered a permanent injunction and final judgment on June 4, 1990. This permanent injunction is reprinted at Appendix, *infra*, p. 8a. It is virtually identical to the preliminary injunction that the court of appeals affirmed in its prior order. On October 15, 1990, this Court denied Texas's petition for writ of certiorari, Justice Blackmun noting that he would dismiss the petition as moot. 111 S.Ct. 308 (1990). On January 18, 1991, the court of appeals affirmed the permanent injunction, based on its prior order with respect to the merits of the preliminary injunction.

JURISDICTION

The airlines invoked district court jurisdiction of this matter under 28 U.S.C. § 1331 and 1337.

The court of appeals, on January 18, 1991, entered a judgment and an opinion affirming the district court's permanent injunction. *See* Appendix, *infra*, p. 1a. No petition for rehearing was sought.

The jurisdiction of the Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Aviation Act § 105(a)(1), 49 U.S.C. § 1305(a)(1) [in pertinent part]. Federal precmption.

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Federal Aviation Act § 411(a), 49 U.S.C. § 1381(a). Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or de-

ceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Federal Aviation Act § 1106, 49 U.S.C. § 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Texas False Advertising Law, TEX. BUS. & COM. CODE §§ 17.46(a), 17.46(b)(9), and 17.46(b)(11). [in pertinent part].

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .. [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised,. . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions . . ..

STATEMENT OF THE CASE

On January 23, 1989, Trans World Airlines, Inc.; Continental Airlines, Inc.; and British Airways PLC commenced this action in the United States District Court for the Western District of Texas, Austin Division, in which the Texas Attorney General was the only named defendant. This action sought both preliminary and permanent relief prohibiting the Texas Attorney General and unspecified others from enforcing the Texas Deceptive Trade Practices Act, or any other (also unspecified) state law, against airline advertising, an injunction that would effectively insulate these airlines from prosecution by the State of Texas for false or deceptive advertising.

These airlines took this extraordinary step of invoking federal court jurisdiction as a shield to avoid conjectured prosecution for violating state laws because the Texas Attorney General and the attorneys general of five other states had written to these airlines in late 1988, advising these airlines that their advertising practices were deceptive and requesting that they voluntarily modify their practices. Rather than comply with state law, the airlines brought suit.

The district court heard these airlines' request for a temporary restraining order on January 27. Not to be outdone by the airlines in unprecedented actions, the district court granted the airlines a preliminary injunction on the next business day. This order enjoined the Texas Attorney General and all other persons acting in concert or participation with him, *and* "all other persons having actual knowledge of" the injunction, from:

> [I]nitiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any

other provision of state law, which would seek *to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising* or the [*sic*] operations involving their rates, routes and/or services.

Appendix, *infra*, p. 50a [emphasis added].

On April 26, 1989, the district court continued on its course of blazing new paths of judicial activism, permitting 10 additional airlines to intervene and broadening the preliminary injunction to include 33 more attorneys general within its scope. Appendix, *infra*, p. 52a.

On appeal, the court of appeals affirmed every action of the district court, holding that the district court's sweeping preliminary injunction was proper because "§1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising." Appendix, *infra*, p. 34a; 897 F.2d at 783.

The preliminary injunction was converted by the district court into a permanent injunction, on June 1, 1990. Appendix, *infra*, p. 8a. The relevant provisions of the permanent injunction, and the basis therefor (federal pre-emption of state consumer protection laws), are the same as those in the preliminary injunction.

This Court denied Texas's petition for writ of certiorari with respect to the Fifth Circuit's opinion on the preliminary injunction, on October 15, 1990, Justice Blackmun noting that he would have dismissed the petition as moot. 111 S.Ct. 308 (1990).

On January 18, 1991, the Fifth Circuit affirmed the issuance of the permanent injunction, based on its determination that its prior opinion on the merits

of the preliminary injunction was the law of the case. Appendix, *infra*, p. 1a.

REASONS FOR GRANTING THE WRIT

This is a case of national significance and far-reaching implications. Acting on no more than the desires of some of the less-scrupulous airlines[5] to avoid the inconvenience of advertising honestly, a federal district court issued, and a court of appeals affirmed, a sweeping injunction that freezes all efforts at enforcement of state consumer protection laws against airlines who intentionally violate those laws in order to steal business away from honest competitors.[6]

In reaching this surprising result, the courts below absolutely ignored the repeated insistence by the Court that pre-emption of state law is to be found only when it is absolutely clear that pre-emption is what Congress–not a few airlines–wanted. And it is only by ignoring the teachings of the Court on pre-emption that the courts below could have reached

---

5 And less solvent. Since this case began, two of the three domestic carriers–Continental and Pan Am–have filed for protection of the bankruptcy courts under Chapter 11 of the Bankruptcy Code. The third–Trans World Airlines–has stated that it also is considering taking that route. Nomani, *TWA May Seek Chapter 11 Status, Even in Routes Sale*, Wall Street Journal, Apr. 3, 1991, at B8.

6 It is unlikely that the Court will have the opportunity, aside from this case, to address this issue in the foreseeable future. All other cases known to Texas that involve this question are now pending in state court (or have been dismissed), and are specifically excepted from the provisions of the injunction herein. *See* Appendix, *infra*, pp. 10a. The effect of the injunction is to prohibit the filing of any additional lawsuits by any state, whether in state or federal court.

the result they did, for the result reached flies in the face of years of precedent in the Court.[7]

In essence, the court of appeals decided that, when Congress enacted the Airline Deregulation Act of 1978, amending the Federal Aviation Act, Congress intended to divest the states of their long-standing power to regulate airline advertising. The court of appeals has strayed far off course.[8] In

---

7 The excessiveness of the district court's order can also be seen in the scope of relief granted. Rather than limiting itself to enjoining the State of Texas, the court reached out and dragged into Texas a total of 33 additional states, most of whom had never had any contact with the State of Texas or any of the airlines regarding airline practices. The over-reaching nature of this injunction serves to underscore the degree to which the district court and court of appeals departed from the accepted and usual course of judicial restraint in the exercise of the limited jurisdiction of the federal courts.

8 The courts below are not the only courts needing guidance on the manner in which to apply the limited pre-emption language of the Act, as is apparent from a review of the differing rationales and results of other courts of appeal. *See, e.g., Alaska v. U.S. Department of Transportation*, 868 F.2d 441, 444 (D.C. Cir. 1989) (Federal Aviation Act permits Department of Transportation to pre-empt state law through regulation); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 1 (1st Cir. 1989) (Federal Aviation Act pre-empts Rhode Island statute regulating circumstances under which employers can require employees to submit to drug testing); *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980) (Federal Aviation Act does not pre-empt New York State General Business Law prohibition against operation of aircraft in a careless or reckless manner); *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988) (Federal Aviation Act does not pre-empt Illinois state common law remedies for airport noise and pollution); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 755 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990) (Federal Aviation Act pre-empts Illinois Consumer Fraud and Deceptive Business Practices Act to the extent that that Act would require an "air carrier to deal with a would-be agent who refuses to respect a contract restricting advertising of discount prices"); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984) (Federal Aviation Act pre-empts California state law providing for full and equal access to airplanes by the handicapped; the Act does not pre-empt California-tort-law-based claims for intentional infliction of emotional distress); and *Air Transport Ass'n of America v. Public Utilities Commission of California*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988) (Federal Aviation Act does not pre-empt "state regulation of utilities insofar as such regulation affects airlines"). At least one state appellate court has also reached the opposite conclusion from the court of appeals here. *People v. Western Airlines, Inc.*, 155 Cal. App. 3d 597, 600, 202 Cal. Rptr. 237 (Cal. Ct. App. 1984), *appeal denied* (Cal. Sup. 1984), *cert. denied*, 469 U.S. 1132 (1985) (Federal Aviation Act does not pre-empt California false advertising laws).

addition, its interpretation of the Act conflicts with a subsequent interpretation by another court of appeals.

In 1978, the country was in a flurry of deregulation activity. The Airline Deregulation Act of 1978 was just one manifestation of that activity. But Congress no more intended, in deregulating airline rates, to prohibit all state authority with respect to the airlines than it intended, in deregulating the savings and loan industry, to foreclose state criminal prosecutions for fraud by the less-scrupulous members of that industry.

In fact, Congress's purpose in enacting the Airline Deregulation Act of 1978 was to encourage competition among the airlines by taking the federal government out of the business of utility-type economic regulation of airlines (setting rates, routes, and services). Congress made sure that no other governmental entity stepped into the breach to defeat the purposes of that deregulation, by adopting Section

105 of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1). *See* 123 CONG. REC. 30595 (Sept. 23, 1977); Pub L. 95-504, 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3740; and 49 U.S.C. § 1302(a)(5).

Prior to 1978, the federal government had strictly dictated the rates, routes, and services an airline could offer. By terminating this control, Congress hoped to encourage competition among airlines and bring ticket prices down. 49 U.S.C. § 1302(a)(3); Pub L. 95-504, 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3773. In so doing, Congress intended to subject airline practices to the full rigors of the marketplace. [9]

State regulation of air fare advertising plays an essential role in ensuring efficient functioning of the marketplace. It makes the marketplace function better by making it function honestly. This benefits the consumer, who gets the information needed to make a proper purchasing decision, and it rewards the honest airline, which does not lose sales to the dishonest one.

The state laws that the court of appeals decided were pre-empted are general consumer protection statutes enacted by state legislatures to prevent deceptive and misleading commercial practices. None of them is directed at airline practices in particular. For example, the Texas statute provides:

---

9 For this reason, at the same time it deregulated rates, routes, and services, Congress also took away from the airlines the protection they had previously enjoyed from the requirements of antitrust laws prohibiting price-fixing. *See* 49 U.S.C. § 1551(a)(2)(A) (repealing Section 1373, which permitted air carriers to fix prices for tickets, with federal approval, and required travel agents not to discount those fixed prices).

> False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .. [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised . . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions . . ..

TEX. BUS. & COM. CODE §§ 17.46(a), 17.46(b)(9), and 17.46(b)(11).

This law applies to used car dealers, pyramid schemers, and snake oil sellers. It also applies to other forms of travel with which the airlines directly compete–trains, buses, rental cars–and to others in the travel industry–travel agents, hotels, motels.

The decision of the court of appeals can only be based on the erroneous conclusion that Congress intended that the airlines (alone among all industries) be granted *carte blanche* to violate these general state false advertising laws, without threat of state law enforcement action to prohibit and punish those violations, simply because the Federal Aviation Act gave the United States Department of Transportation ("Department") the job of policing false advertising at the federal level.

The Fifth Circuit was apparently unconcerned about the practical effect of precluding state law enforcement because it believed that the Department could do the job all by itself. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 783 (5th Cir. 1990); Appendix, *infra*, at 34a.

Unfortunately, the Department is *not* doing its job. A recent newspaper article lamented the actual

unavailability of bargain fares to Europe advertised by airlines such as Continental and Pan Am and noted the Department's inability, due to limited enforcement capabilities, to police bait and switch tactics. Sharkey, *Bargain Fares, But How Many?*, New York Times, Mar. 31, 1991, Travel Section at 3, col. 1.

Beyond bait and switch, it is clear that airlines are now engaging in precisely the activity that Texas and other states would seek to stop. For example, a recent Pan Am advertisement in *The Dallas Morning News* emblazons a $299 fare to Paris and other European destinations in numbers nearly three inches high. Dallas Morning News, Mar. 19, 1991, at 11A. Then, in letters one-sixteenth of an inch high, Pan Am qualifies that price with the statement that the "Fare is each way based on roundtrip economy purchase." The fare thus jumps to $598. But only the most thoroughgoing reader would then wade through the morass of mice type at the bottom of the advertisement that says (among other things) that a "$26 U.S. departure tax, security surcharge, customs/immigration fee [is] not included," increasing the fare still further to $624. What began, writ large, as a bargain $299 fare has now grown by 209%, and is decidedly less the bargain Pan Am wants its unwitting passengers to believe.

During the same period of time, Continental advertised bargain fares in the *Dallas Times Herald*. Dallas Times Herald, Mar. 20, 1990, at A11. A ticket to Paris was advertised at $159, with the notation that the price was "each way (roundtrip purchase required)," elevating the fare to $318. Here, however, to learn what (if any) additional charges might be

added on, the consumer must decipher this statement in the mice type at the bottom of the page:

> $6 International Departure Tax, $5 Customs Fee (not applicable Mexico and Caribbean), $5 Immigration and Naturalization Fee (not applicable U.S. Virgin Islands), and Security Fee (not applicable U.S. Virgin Islands), which may be different depending upon destination ($10 Europe, Caribbean and Latin America, $15 Jamaica, $21 Dominican Republic), not included in fare.

An educated guess is that the consumer will be faced with an additional $26 in fees, just as with Pan Am, resulting in an actual fare of $344–*216% over the fare promoted* by Continental.

The Department needs all the help it can get in policing advertising of this nature. The federal courts should not be used as a vehicle to frustrate a state's efforts to enforce its own laws to protect its citizens, especially when the federal agency cannot do the job by itself.

In concluding that Congress intended the Federal Aviation Act to have such sweeping pre-emptive effect over state false advertising laws, the court of appeals ignored the repeated statements of the Court that pre-emption may be found to exist only when it is clear that pre-emption is what Congress intended.

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons–either that the nature of the regulated subject matter permits no other conclusion, or *that the Congress has unmistakably so ordained*.

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) [emphasis added].

The Court has repeatedly affirmed the "presumption against finding preemption of state law in areas traditionally regulated by the States" and the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *California v. Federal Energy Regulatory Comm'n*, 110 S.Ct. 2024, 2029 (1990), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). There is a long history of state enforcement of consumer protection laws as an aspect of state police powers. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) and *Friedman v. Rogers*, 440 U.S. 1 (1979).

It is with this presumption against finding preemption that we must approach any analysis of the effect of the Federal Aviation Act on state false advertising laws.

Another court of appeals has approached an analysis of the Act in a manner in keeping with the teachings of this Court. In *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991), the Ninth Circuit held that Section 105 of the Federal Aviation Act pre-empts claims based on state law "only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted." 923 F.2d at 660 [emphasis in original].

This holding of the Ninth Circuit is in clear conflict with the interpretation of Section 105 upon

which the Fifth Circuit based its holding in this case. The Ninth Circuit does not discuss the Fifth Circuit's opinion. It does, however, cite as authority *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1990). The district court there was aware of the district court's holding in this case and did not follow it. *Id.*, 728 F.Supp. at 166-167.

It could be asked whether *West* must be disregarded because the holding of the Ninth Circuit did not directly involve airline advertising. But this is neither a distinction nor a difference. It ignores the fact that the injunction at issue in this case itself involves much more than airline advertising. The permanent injunction issued by the district court restrains the states from initiating any enforcement actions pursuant to state law "which would *seek to regulate or restrict any aspect of the individually named Plaintiff airlines'* air fare advertising or their other *operations involving their* rates, routes, and/or *services*." Appendix, at 10a [emphasis added]. In addition, one case cited with approval by the *West* court, 923 F.2d at 660, did in fact involve state regulation of airline advertising. *New York ex rel. Abrams, supra.*

The issues in the case before the Court fall squarely within the reasoning and holding of *West*. The *West* opinion is in clear conflict with the Fifth Circuit's opinion.[10]

The approach taken by the court of appeals is a radical departure from the conservative approach

---

10 The *West* court also discussed and rejected implicit and conflict pre-emption. 923 F.2d at 660-661. Although the Fifth Circuit limited its pre-emption finding to explicit pre-emption, *West* stands for the proposition that the state laws at issue here are not pre-empted in any way.

long mandated by the Court, and followed by the Ninth Circuit in *West*. The Fifth Circuit's approach should be corrected.

This Court last addressed the specific issue of pre-emption of state law by the Federal Aviation Act in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), and found no basis for pre-emption.

The Court there construed Section 411 of the Federal Aviation Act, 49 U.S.C. § 1381(a). That section gives the Department of Transportation the authority to stop "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

When Congress, in 1978, stopped federal regulation of airlines' rates, routes, and services and enacted Section 105 to keep the states from beginning that very regulation, Congress left Section 411 untouched. If Congress had intended to deregulate the airlines so radically as to permit them to engage in deceptive practices without fear of prosecution, it would have repealed Section 411 when it enacted Section 105. But it did not–a clear indication that Congress intended regulation of deceptive practices by airlines to continue just as it had existed before it enacted Section 105.

In *Nader*, the Court held that Congress did not intend exclusive federal regulation of deceptive airline practices. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 301. The Court concluded that Congress, in providing for federal regulation of unfair or deceptive practices, did not intend to immunize airlines from liability under state law.

> In sum, § 411 confers upon the [Civil Aeronautics] Board [now, the Department of Transportation] a new and powerful weapon against unfair and deceptive practices that injure the public. But it does not represent the only, or the best, response to all challenged carrier actions that result in private wrongs.

Nader v. Allegheny Airlines, Inc., 426 U.S. at 303.

In reaching this conclusion, the Court relied in particular on the savings clause in the Act:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Section 1106, 49 U.S.C. § 1506; *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 300.

When Congress enacted the Airline Deregulation Act in 1978, *Nader* was a recent case, one of which Congress was surely aware. Had Congress wanted to overrule *Nader*, and to prevent state regulation of false advertising, it could have done so at that time.

Congress could easily have included advertising within the scope of the pre-emption–"relating to rates, routes, services, or advertising."[11] It could have made the language very broad–"relating to operations." But Congress did not do so. The fact that it did not is further indication that it intended to permit continued state authority. Instead, Congress enacted

---

11 *See, e.g.*, 15 U.S.C. § 1334(b): "No requirement or prohibition based on smoking and health shall be imposed under State law *with respect to the advertising or promotion* of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter [on cigarette labeling and advertising]." [Emphasis added.]

limited pre-emption language, and that language must be given a limited reading. That limited reading does not result in pre-emption of state advertising regulation, because advertising is not a rate, route, or service.

In arriving at its conclusion, the Fifth Circuit relied on the Court's line of cases construing the Employee Retirement Income Security Act of 1974 ("ERISA"), simply because both ERISA and the Federal Aviation Act pre-empt state laws "relating to" certain aspects of those Acts. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 780 (5th Cir. 1990); Appendix, *infra*, p. 25a.

The Fifth Circuit's reliance on the Court's ERISA cases is misplaced. ERISA pre-emption is founded on three separate provisions of ERISA–the pre-emption clause, the savings clause, and the deemer clause–which the Court reads together to find sweeping pre-emption under ERISA. *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990). Unless a statute that would be covered by the savings clause is excluded by the deemer clause, there is no pre-emption. *Id.*, at 409.

However, unlike ERISA, the Federal Aviation Act has only a pre-emption clause and a savings clause–there is no deemer clause to restrict the effect of the savings clause. And this Court has already affirmed that the savings clause provides that the Act does not abridge or alter remedies at common law or by statute. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 300; Section 1106, 49 U.S.C. § 1506.

The need for continued vitality of the savings clause is underscored by the fact that the Federal Aviation Act, unlike ERISA, does not provide a federal remedy when pre-empting state law enforcement. *See Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 485 (1990). If the Act's pre-emptive effect is as broad as the Fifth Circuit would have it, then the State and its citizens are left without any remedy for deceptive airline practices.

The direct result of the court of appeals decision is to stymie all efforts by the states to control the deceptive practices of the airlines. The breadth of the injunction gives the states no alternative but to stop policing those practices. To do otherwise is to risk contempt of court.

The indirect result of the court of appeals decision is to give the airlines a basis for avoiding state policing of illegal activities having no connection with advertising, but which arguably are within the penumbra of "any aspect of the individually named plaintiff airlines' . . . operations involving their rates, routes, and/or services." Appendix, *infra*, p. 10a. Quite conceivably, if this decision stands, we will see an attempt to avoid the application of state antitrust laws, since enforcement of those laws might somehow "involve" rates, routes, or services. The potential for a hodgepodge of decisions is great, despite the Court's repeated deference to state antitrust laws. *See California v. American Stores Co.*, 110 S.Ct. 1853 (1990) and *California v. ARC American Corp.*, 109 S.Ct. 1661 (1989).

Criminal laws, too, are open to attack. For example, states must be free to prohibit, or to permit, gambling–something some people might consider a "service"–in airline terminals (such as slot machines in Nevada airports). It is unlikely that Congress intended to displace all state criminal law. *See English v. General Electric Co.*, 110 S.Ct. 2270, 2277 (1990). But, if the logic of the court of appeals is allowed to stand,

control of gambling in airline terminals "relates to" services, and will be claimed to be pre-empted.

Pre-emption of state antitrust laws and criminal laws is clearly not what Congress intended when it amended the Federal Aviation Act in 1978. By the same token, neither did Congress intend to pre-empt state false advertising laws. That is what the court of appeals did in its decision, and the intervention of the Court to settle the matter is needed.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
DAN MORALES
Attorney General of Texas
WILL PRYOR
First Assistant Attorney General
MARY F. KELLER
Executive Assistant Attorney General

Counsel of Record:
STEPHEN GARDNER
Assistant Attorney General
Office of the Attorney General
714 Jackson St., Ste. 700
Dallas, Texas 75202
214/742-9698

APPENDIX

INDEX TO APPENDIX

Page

Opinion of Court of Appeals, affirming Final Judgment and Permanent Injunction, filed January 18, 1991 ____ 1a

Order of District Court, granting Final Judgment and Permanent Injunction against Texas and 33 additional States, signed June 1, 1990 ____ 8a

Opinion of Court of Appeals, affirming Preliminary Injunction, filed April 3, 1990 ____ 13a

Order of District Court, granting Preliminary Injunction against Texas, signed January 30, 1989 ____ 48a

Order of District Court, clarifying Preliminary Injunction, signed February 23, 1989 ____ 51a

Order of District Court, broadening Preliminary Injunction to enjoin 33 additional States and to include nine additional air carriers, signed April 26, 1989 ____ 52a

Order of District Court, broadening Preliminary Injunction to include one additional air carrier, signed May 26, 1989 ____ 65a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8387
Summary Calendar

TRANS WORLD AIRLINES, INC., et. al,

Plaintiffs-Appellees,

versus

JIM MATTOX, Attorney General of
the State of Texas, et. al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas
(CA A 89 CA 67)

(January 18, 1991)

Before JOHNSON, SMITH and WIENER, Circuit Judges.

PER CURIAM:[1]

Defendants[2] appeal from the district court's grant of Plaintiffs' motion for summary judgment and the imposition of a permanent injunction. Finding no error, this Court affirms.

I. FACTS AND PROCEDURAL HISTORY

The background facts for this appeal are thoroughly explained in the prior consolidated appeal of this action. See **Trans World Airlines, Inc. v. Mattox,** 897 F.2d 773 (5th Cir.1990). In the prior appeal, a panel of this Court affirmed the district court's issuance of a preliminary injunction. It is necessary here only to note one significant factual event which occurred subsequent to the prior appeal. The district court, after considering this Court's prior opinion, granted summary judgment in favor of Plaintiffs and permanently enjoined the Defendants and "all other parties acting in concert or participating with the Defendants [sic] or on their

---

1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal professions." Pursuant to that Rule, the court has determined that this opinion should not be published.

2 Defendants are attorneys general from the states of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

behalf, and all other persons having actual knowledge of this order" from

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

Defendants timely appealed.

II. DISCUSSION

Defendants advance the following issues in this appeal:

> 1. Did the district court abuse its discretion by emjoining thirty-four sovereign state attorneys general (including Texas) from enforcing their individual state laws in a case where the district court lacks jurisdiction over the claims of each airline plaintiff because there is no case or controversy?
>
> 2. Did the district court abuse its discretion by enjoining these state attorneys general because the court lacked subject matter jurisdiction in fact over these attorneys general?
>
> 3. Did the district court abuse its discretion in granting the airlines' request for declaratory relief when it had no independent basis to exercise jurisdiction over the attorneys general?

4. Did the district court abuse its discretion by granting plaintiffs' motion for summary judgment or judgment on the pleadings when the record discloses that material questions of fact exist?

5. Did the district court abuse its discretion by never requiring plaintiffs to respond to each of the issues raised by the thirty-three states' motions to dismiss the amended complaint and never ruling on said motions, never allowing the states the right to answer the amended complaint and never allowing the states the right to develop through discovery facts to contradict plaintiffs' allegations regarding the claimed subject matter jurisdiction of the district court over each and every one of the state attorney general defendants?

6. Did the district court abuse its discretion by extending the scope if its final judgment and permanent injunction to include within its purview "all other persons having actual knowledge of this order"?

7. Did the district court abuse its discretion by permanently enjoining thirty-three sovereign state attorneys general over whom it lacks personal jurisdiction from enforcing their own state false and deceptive advertising and practices laws?

8. Did the district court abuse its discretion by permanently enjoining thirty-three attorneys general as to whom it has no jurisdiction because venue, as to these attorneys general, is not proper in the Western District of Texas because none of them reside in that district and, as to them, the claim, if any, did not arise in that district?

9. Did the district court abuse its discretion by permanently enjoining thirty-three sovereign attorneys general who were improperly held to be parties to the action because the district court does not have personal jurisdiction over these attorneys general?

10. Did the district court abuse its discretion by enjoining thirty-four sovereign state attorneys general from enforcing their state laws prohibiting false and deceptive advertising and practices against false airline advertising because it held that the states were preempted from so enforcing their laws by the terms of 49 U.S.C. section 1305(a)(1)?

11. Did the district court abuse its discretion by extending the permanent injunction to include intervenor Pan Am within its scope?[3]

---

3 The discussion refers to the issues as here numbered.

For the reasons set forth below, this Court finds no abuse of discretion on any of these listed issues.

Under the law of the case doctrine, an appellate court can refuse to reexamine in a subsequent appeal of the same case issues which were decided either explicitly or by necessary implication in the prior opinion. **Conway v. Chemical Leaman Tank Lines, Inc.**, 644 F.2d 1059, 1061 (5th Cir. 1981). While use of the law of the case doctrine is not mandatory, a court is more likely to apply the doctrine when the prior opinion was apparently well-considered, as in the instant case. Defendants concede that the prior opinion, reported at 879 F.2d 773, became the law of the case with respect to the issues listed above as issues 7 through 12. This court agrees and will not reexamine issues 7 through 12. The law of the case doctrine also applies to other issues as well. In issue 1, Defendants claim that the district court lacked subject matter jurisdiction because of the lack of a case or controversy. Defendants' arguments on this issue are substantially the same as made in the prior appeal. While the prior opinion does not explicitly discuss it, the necessary assumption is that the prior panel found subject matter jurisdiction present. Otherwise, the panel would not have reached the merits and affirmed the preliminary injunction. This same rationale applies to the jurisdictional issue presented in issue 3. Defendants' arguments in the prior appeal on this issue were substantially the same and the panel implicitly found subject matter jurisdiction.

Issues 2, 3 and 5 reflect essentially the same argument. Defendants contend that the district court erred in granting summary judgment because there were unresolved fact issues. Defendants have failed

to point out any outstanding factual issue relevant to the judgment. The question of preemption, the cornerstone of the case, is a question of law which the district court could clearly resolve on the basis of the summary judgment evidence available. Further, Defendants' contention that there were unresolved fact issues necessary to determine the existence of subject matter jurisdiction is without merit. As discussed above, the prior panel evidently found subject matter jurisdiction without the need to resolve any fact issue.

Finally, Defendants argue in issue 6 that the permanent injunction is overly broad by encompassing "all other persons having actual knowledge of this order." The injunction clearly applies to Defendants and Defendants do not contend otherwise. This Court need not decide whether such language is overly broad, however, since Defendants have no standing to assert the rights of hypothetical third parties.

III. CONCLUSION

The Court finds no reversible error. The district court is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067 (consolidated)
JIM MATTOX, ATTORNEY GENERAL, STATE OF TEXAS, ET AL. Defendant.	§	

FINAL JUDGMENT

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and after careful consideration of the Amended Complaint, the opinion of the United States Court of Appeals for the Fifth Circuit in Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990), Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment, the Defendants' response thereto, and the arguments of counsel, the Court finds that Plaintiffs will suffer immediate, irreparable and continuing injury if the attorneys general of the states of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma,

Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, or parties in concert or participating with them, are permitted to bring enforcement actions against Plaintiffs, or any of them, pursuant to their respective states' laws, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other promotional and informational advertising.

The Court finds and declares that the Defendants have committed acts as set forth in Plaintiffs' Amended Complaint, and will continue to do so unless restrained by this Court; that there is no genuine issue of material fact; that Plaintiffs are entitled to judgment as a matter of law; that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been pre-empted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1305(a)(1); that subsection 2.5 of the NAAG Guidelines, which purports to require that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and that continual threats of enforcement actions by the Defendant attorneys general and others in concert or participating with them would violate the Supremacy Clause of the United States Constitution. The Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendants and, in fact, would be in the public interest.

The Court further finds it unnecessary to decide whether the threatened implementation or enforcement of the NAAG Guidelines through state

law by the defendant attorneys general, or by others in concert or participating with them through their respective states' laws, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the interstate compact clause (Art. I, § 10, cl. 3, U.S. Constitution); or violates Plaintiffs' First Amendment rights. Accordingly, it is

ORDERED that Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment is GRANTED. It is further

ORDERED that the Attorneys General of the States of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, both individually and in their official capacities, their agents, servants, employees, and all other persons acting for the defendants in either capacity, and all other persons acting in concert or participating with the Defendants or on their behalf, and all other persons having actual knowledge of this order be and hereby are permanently enjoined from:

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

It is further

ORDERED that this injunction will operate prospectively only and will not act to interfere with the continuation of the following pending proceedings:

A. Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on march 9, 1989. This action was subsequently removed to Federal District Court for the Southern District of California which has since remanded this matter to the San Diego County, California Superior Court.

B. Cause No. 89-41703, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the New York Supreme Court, New York County, on March 29, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

C. Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989. This action was subsequently removed to Federal District Court for the District of Kansas which has since remanded this matter to the Shawnee County, Kansas District Court.

D. Cause No. 89 CIV 2425 Pan American World Airways, Inc. v. Robert Abrams, as Attorney General of the State of New York, filed by Pan American World Airways, Inc. in the Southern District Court of New York on April 11, 1989.

E. Cause No. 89-42223, The People of the State of New York, ex rel Robert Abrams v. Pan American World Airways, Inc., filed by Attorney General Robert Abrams in New York Supreme Court, New York County on April

20, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

It is further

ORDERED that Plaintiffs shall recover of the Defendants the costs of this action.

SIGNED this 1st day of June, 1990.

/s/ Walter S. Smith,Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, Defendant-Appellant.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

Pan American World Airways, Intervening-Plaintiff-Appellee,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants

Nos. 89-1142, 89-1509 and 89-1610.

United States Court of Appeals, Fifth Circuit.

April 3, 1990.

Appeals from the United States District Court for the Western District of Texas.

Before LIVELY,* JOLLY and HIGGINBOTHAM, Circuit Judges.

---

* Circuit Judge of the Sixth Circuit, sitting by designation.

LIVELY, Circuit Judge.

The dispositive question in these consolidated appeals is whether state laws proscribing deceptive advertising are preempted by federal law when the state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Three separate appeals were consolidated for oral argument. We refer to the cases by their Court of Appeals numbers.

In number 89-1142, the Defendant-Appellant is Jim Mattox, the Attorney General of Texas. The Plaintiffs-Appellees are Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental) and British Airways, PLC (British Air).

In numbers 89-1509 and 89-1610, the Defendants-Appellants are the attorneys general of Texas and thirty-three other states. The Plaintiffs-Appellees are TWA, Continental, British Air, Pan American World Airways, Inc. (Pan Am) and ten other airlines.

We affirm the orders appealed from in each of the three appeals.

I. *Background*

A. History of Proceedings

Number 89-1142:

In December 1987, the National Association of Attorneys General (NAAG) adopted guidelines related to airline advertising. The guidelines provide that any fuel, tax or other surcharge to air fare must be included in the total advertised price of the fare. The guidelines are not law.

On November 14, 1988, the attorneys general of Texas and four other states sent letters to TWA, Continental and British Air, notifying them that some of their advertisements violated the NAAG guidelines and these states' false advertising and deceptive practices laws. The letters charged that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees.

In particular the Attorney General of Texas stated that the airlines had violated the Texas Deceptive Trade Practices Act. The Attorney General advised the airlines that advertising a specific amount for a fare was deceptive if the advertised amount did not reflect the true cost of travel because certain surcharges had not been included in the advertised fare. The letter threatened prosecution.

In January 1989, TWA, Continental and British Air filed suit in the United States District Court for the Western District of Texas to enjoin the Attorney General of Texas from enforcing the Texas Deceptive Trade Practices Act against their advertising.

Following a hearing, the district court granted a preliminary injunction. 712 F.Supp. 99. The court found it probable that the plaintiffs would prevail in establishing their claims that any state regulation of advertising related to the airlines' rates, routes and services had been preempted by federal law. The injunction forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, "which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services." The district court later clarified its injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas. In number 89-1142, the Attorney General of Texas appeals from the order granting the preliminary injunction.

Number 89-1509:

On March 16, 1989, the plaintiffs TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who had appeared in a hearing in number 89-1142.

On April 27, 1989, the district court issued an order granting the motions of ten other airlines to intervene as plaintiffs. The court also granted the plaintiffs permission to amend their complaint to add as defendants the attorneys general of the thirty-three other states who had appeared in the action. The court then broadened the preliminary injunction to include the attorneys general of the other thirty-three states.

The district court noted that since the injunction had been issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am. The broadened injunction acted prospectively and did not affect these pending state court cases against TWA and Pan Am. The thirty-four attorneys general appeal this broadening order in number 89-1509.

Number 89-1610:

After the Attorney General of Texas sued Pan Am in state court, charging deceptive practices, Pan Am removed the case to the United States District Court for the Northern District of Texas. Attorney General Mattox objected to removal to federal court and moved to remand the case to state court. His motion was denied. This case was then transferred to the United States District Court for the Western District of Texas. On May 30, 1989, the District Court for the Western District consolidated this removed case with number 89-1509. The court issued an order granting Pan Am's motion to intervene in number 89-1142 and broadening the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The thirty-four state attorneys general appeal this order of the district court in number 89-1610.

B. Brief Overview of Federal Regulation (and Deregulation)

The framework for federal regulation of civil aviation was set forth in the Civil Aeronautics Act of

1938, Ch. 601, 52 Stat. 973 (1938). This statute created the Civil Aeronautics Authority, whose name was changed to the Civil Aeronautics Board (CAB) in 1940, and vested it with broad powers to regulate commercial aviation. Included in that portion of the statute dealing with economic regulation was section 411, which gave the Authority the power to determine if any carrier engaged in unfair or deceptive practices or unfair methods of competition. *Id*. at 1003. The statute also contained a savings clause in section 1106, which stated that nothing contained in the Act would "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." *Id*. at 1027.

The Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731 (1958) (the Act), continued the CAB and created the Federal Aviation Agency (FAA). The Act reenacted section 411 as it appeared in the Civil Aeronautics Act of 1938, except for substitution of "Board" for "Authority." It also reenacted section 1106, which provided that other common law and statutory remedies remained viable.

Congress enacted the Airline Deregulation Act in 1978. Pub.L. No. 95-504, 92 Stat. 1705 (1978) (Deregulation Act). The purpose of this statute was to encourage and develop an air transportation system that "relies on competitive market forces to determine the quality, variety, and price of air services." *Id*. The Deregulation Act directed the CAB to consider a number of factors to be in the public interest, including "[t]he prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation." *Id*. at 1706. The Deregulation Act did not change sections 411 or 1106 of the existing

statute, but did add a federal preemption provision. Section 105 stated that "no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Id*. at 1707-08.

The House Committee on Public Works and Transportation noted that "[e]xisting law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts. . . ." H.R.Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 3737, 3751-52. The Committee intended section 105 to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." H.R.Rep. No. 1211 at 16; 1978 U.S.Code Cong. & Admin.News at 3752.

The Deregulation Act also contained "sunset provisions" terminating some of the CAB's authority and transferring some authority to the Department of Transportation (DOT) and other federal departments. The sunset provisions neither terminated nor transferred the CAB's authority under section 411.

In 1980, Congress amended section 102 of the Act by adding a more comprehensive treatment of matters to be considered in the public interest. This treatment contains a new emphasis on "maximum reliance on competitive market forces and on actual

and potential competition" to achieve the goals of safe, efficient and economic air transportation. Pub.L. No. 96-192, 94 Stat. 35 (1980). However, since 1938 it has been in the public interest for the CAB to promote adequate, economical and efficient air service without unfair or destructive competitive practices. 52 Stat. 980; 49 U.S.C.App. § 1302(a)(3). And, since 1978 "the prevention of unfair, deceptive, predatory or anticompetitive practices" has been in the public interest. 92 Stat. 1706; 49 U.S.C.App. § 1302(a)(7).

Finally, Congress enacted the Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703 (1984) (Sunset Act). This law terminated or transferred the remaining functions of the CAB and provided for its demise. Sections 411 and 1106 of the original Act were neither terminated nor transferred. However, the Sunset Act contained a provision that all authority of the CAB neither terminated on or before January 1, 1985, nor otherwise transferred, was transferred by law to DOT. *Id.* at 1704. The Sunset Act made no material changes in sections 105 and 411, the preemption provision and the section dealing with "unfair or deceptive practices or unfair methods of competition," respectively. They are codified now as 49 U.S.C.App. §§ 1305 and 1381. Section 12 of the Sunset Act added savings provisions that continued in effect all rules, regulations, orders and determinations of the CAB and gave the same authority as held by the CAB to any agency to which CAB functions were transferred. These provisions are codified now as 49 U.S.C.App. § 1556. It also retained section 1106, now codified as 49 U.S.C.App. § 1506.

The House Committee on Public Works and Transportation noted that there was a need to clarify the status of some of the CAB's authority after sunset. H.R.Rep. No. 793, 98th Cong., 2d Sess. 1, 3 (1984), *reprinted in* 1984. U.S.Code Cong. & Admin.News 2857, 2859. The sunset provisions of the 1978 Deregulation Act did not deal with the authority to protect consumers and to prevent unfair competitive practices. H.R.Rep. No. 793 at 3; 1984 U.S.Code Cong. & Admin.News at 2859. The Committee concluded that this important authority should be continued and should be exercised by DOT. H.R.Rep. No. 793 at 4-6; 1984 U.S.Code Cong. & Admin.News at 2860-62. The following passages in the report are of particular interest:

> In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

> The Committee has determined that the Department of Transportation is the most appropriate agency to administer CAB's consumer protection and unfair competitive practice authorities. Under the ADA, DOT will get CAB's authority to protect consumers and competitors insofar as international aviation and essential air service (EAS) are involved, and it would be confusing and inefficient to have DOT protect consumers and carriers in international and EAS

> operations, and another agency, such as FTC, protect consumers and carriers in other domestic operations. Airline flights frequently are not limited to one of these categories. Some airline flights provide both essential air transportation and other domestic transportation and other flights provide both domestic and international service. If two agencies shared authority for consumer protection, the rules could shift in mid-flight.

H.R.Rep. No. 793 at 6; 1984 U.S.Code Cong. & Admin.News at 2862. The concerns expressed by the Committee with respect to divided authority by more than one federal agency would appear equally valid with respect to a division of authority between the federal government and the states.

II

The Supreme Court has considered claims of preemption in many contexts, and has developed an analytical framework for deciding such claims. The Court recently wrote:

> The circumstances in which federal law pre-empts state regulation are familiar. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 383 [103 S.Ct. 1905, 1912, 76 L.Ed.2d 1] (1983). See also *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-154 [102 S.Ct. 3014, 3022-3023, 73 L.Ed.2d 664] (1982). A pre-emption question requires an examination of congressional intent. *Id.*, at 152 [102 S.Ct., at 3022]. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. See, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 [103 S.Ct. 2890, 2898-2899, 77 L.Ed.2d 490] (1983). In the absence of explicit statutory language, however, Congress implicitly may

> indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 [83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248] (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941).'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 [107 S.Ct. 1419, 1425, 94 L.Ed.2d 577] (1987), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 [104 S.Ct. 615, 621, 78 L.Ed.2d 443].

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988). See also, *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205 (5th Cir.1985).

We look first to see if state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines. It will be necessary to consider preemption by implication only if we find no express preemption.

A.

The airlines contend that section 105(a)(1) of the Act expressly preempts state laws pertaining to the advertising of fares by airlines. Section 105, as noted, was added to the Act in 1978 by the Deregulation Act. Section 105(a)(1), states:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

49 U.S.C.App. § 1305(a)(1) (1988). The exception in paragraph (2), referred to in the quoted text, has no application to this case.

The Attorney General of Texas, joined by the other state attorneys general in their briefs, argues that the state has the power to regulate the deceptive advertising of fares by airlines, and that federal law does not preempt his right to enforce state law. He contends that section 105 only preempts state regulations relating to the rates, routes or services of airlines, but does not expressly preclude state regulations relating to all airline operations. He maintains that state regulation of deceptive fare advertising by airlines does not relate to rates, routes or services. Attorney General Mattox argues that the legislative history of section 105 does not indicate congressional intent to preempt state regulation of

deceptive fare advertising by airlines. Such regulation by the states protects the competitive functioning of the market place, he contends, and was not within the scope of state regulations that Congress intended to preempt.

The airlines respond that section 105 preemption applies to all laws "relating to rates, routes, or services" of airlines, and that the advertising of fares by airlines clearly relates to rates. Thus, the airlines argue that the district court correctly enjoined the state attorneys general from enforcing the various state laws. In addition, they note that section 411 of the Act, 49 U.S.C.App. § 1381, empowers DOT to regulate "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

B.

In our discussion we refer to the sections of the Act by their presently codified numbers. We conclude that state laws proscribing deceptive advertising are preempted by § 1305(a)(1) when a state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Neither the Supreme Court nor any court of appeals has decided this precise issue. Two courts of appeals, however, have found express preemption of certain aspects of airline operations. See *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir.1989) and *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir.1989). These courts of appeals have particularly relied upon the Supreme Court's construction of section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA) which preempts all state laws "insofar as they . . . relate to any employee benefit plan." *Shaw v. Delta*

Air Lines, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). In *Shaw* the Court concluded that Congress used "relate to" in the broad sense and that any law "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-98, 103 S.Ct. at 2899-2901.

Illinois Corporate Travel was an action brought by a travel agent against American Airlines, in which the travel agent asserted a federal antitrust claim and three state law claims. One of the state law claims was based on the Illinois Consumer Fraud and Deceptive Business Practices Act, and the others were based on common law. 889 F.2d at 752, 754. The travel agent had advertised that it offered discounts on American's tickets, and American attempted to stop such discount price advertising by denying the travel agent access to the plate used to issue tickets for the airline and by informing other airlines that it would not accept tickets that the travel agent wrote using their plates. American also issued an addendum to the agreement all travel agents must sign forbidding those selling its tickets to advertise that they offer discounts. *Id.* at 752.

The Seventh Circuit affirmed the district court's decision to dismiss two of the state law claims because they were preempted by § 1305(a)(1). Noting the Supreme Court's observations in *Shaw*, the court stated, "Price advertising surely 'relates to' price; the 'relating to' language in § 1305(a)(1) substantially increases the extent of preemption." *Id.* at 754. The court also disposed of the travel agent's argument that the language in § 1506 (the "savings clause") preserved the state law claim. The court held that this section preserves state law claims from implicit

preemption, but not from express preemption. If a state law relates to "rates, routes, or services," it is preempted; "the absence of contrary federal law is irrelevant." *Id.*

In *New England Legal Foundation*, the court of appeals reversed a district court decision that the state authority could enact a landing fee scheme that created great disparity between user fees charged smaller and larger aircraft. 883 F.2d at 175. There were many issues in the case, but its outcome turned on the determination of DOT's role after deregulation and the application of § 1305(a)(1). Administrative proceedings were begun before an ALJ prior to institution of the district court action. DOT and the district court reached contrary conclusions concerning the validity of the landing fee scheme. *Id.* at 171.

The court of appeals concluded that DOT had primary jurisdiction and that the district court should have deferred to DOT's interpretation of § 1305(a)(1). The court noted that the CAB's regulatory responsibilities that survived deregulation were assigned to DOT, and stated:

> In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation. Congress expressly preempted state and local regulation by enacting § 105(a), which specifically provides that "no state or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier. . . ." 49 U.S.C.App. § 1305(a).

Id. at 173. The court concluded that the landing fee scheme was preempted by § 1305(a)(1). *Id.* at 175.

In addition, without referring to *Shaw*, this court and other courts of appeals have found express preemption under § 1305(a)(1).

This court concluded in *O'Carroll v. American Airlines*, 863 F.2d 11 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989) that § 1305(a)(1) preempted state law claims for damages by a passenger who was excluded from a flight after creating a disturbance on a plane. The court found that this section expressly preempted the state laws relied upon by the plaintiff, thus making consideration of implied preemption unnecessary. *Id.* at 13.

Two courts have found that § 1305(a)(1) preempted state laws concerning the treatment of handicapped passengers. In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir.1984), the court of appeals affirmed a directed verdict for the airline on a blind passenger's state law claims for discrimination in seating. The court found that state anti-discrimination laws were preempted as "relating to" services within the meaning of § 1305(a)(1). *Id.* at 1415. Accord *Anderson v. USAir*, 818 F.2d 49 (D.C.Cir.1987).

C.

The attorneys general cite three recent decisions by federal district courts concerning state regulation of the advertising of fares by airlines: *New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y.1989); *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal.1989); and *Kansas v. Trans*

World Airlines, 730 F.Supp. 366 (D.Kan.1990). In each case, the state attorney general filed a state court suit against the airline, alleging that the airline's advertising of fares violated state deceptive practices laws. The airline removed the case to federal court. Then, the attorney general moved to remand the action to state court, and the district court granted the motion.

In *New York*, the court found that § 1305(a)(1) does not expressly preempt the State's enforcement of its deceptive practice laws concerning airline advertising. 728 F.Supp. at 176. The court concluded that any relationship between New York's enforcement of its laws against deceptive advertising and an airline's rates, routes and services is remote and indirect. *Id.* at 176. The court expressed concern that a finding that § 1305(a)(1) preempted New York law might "doom every state regulation affecting airlines." *Id.* at 176.

The district court in *California* made the following observation:

> In the instant case, plaintiff [state attorney general] could not bring an action under the Federal Aviation Act or its counterparts to enjoin the alleged false advertising. It appears from the statute that only the Administrator of the FAA may institute a civil action against an airline for a violation of the statute. See 49 U.S.C.A.App. § 1471. In fact, the whole contention of defendant [airline] is that the Department of Transportation (DOT) has sole authority to enforce alleged unfair advertising. Assuming arguendo that state regulation of airline advertising were preempted, since the Federal Aviation Act gives plaintiff no cause of action, plaintiff may bring a suit to enforce its alleged right in state court, and such a

case "arises under" state law only. *See Franchise Tax Board*, [*v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)], *supra*.

California, 720 F.Supp. at 828.

In *Kansas*, the court found:

> TWA has not met its burden of demonstrating clear congressional intent to make cases such as the present one removable. The court finds that the language of the preemption section precluding state regulation "relating to rates, routes or services" does not by its terms include advertising. [Citation omitted]. The Court accordingly finds that the Act does not provide a basis for removal under the "complete preemption" exception to the well-pleaded complaint rule. [Citation omitted].

Kansas, 730 F.Supp. at 368.

In addition, the attorneys general rely on *People v. Western Airlines*, 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (Cal.Ct.App.1984), *cert. denied*, 469 U.S. 1132, 105 S.Ct. 815, 83 L.Ed.2d 808 (1985). There the court noted that Congress had granted the CAB broad authority to regulate unfair competition and deceptive practices by airlines, but the court concluded that there was no inherent conflict between this authority and California's enforcement of its false advertising laws against interstate air carriers. 202 Cal.Rptr. at 238-39. This decision appears to turn on a finding of no implied preemption, rather than an examination of § 1305 to determine whether Congress had expressly preempted the state law action.

Also, the attorneys general cite *Nader v. Allegheny Airlines*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), in which the Court held that a common-law tort action for fraudulent misrepresentation was not preempted by reason of the CAB's authority over "deceptive practices" under § 1381. However, *Nader* was decided prior to the addition of § 1305 to the Act. Thus, there was no basis for a finding of express preemption at the time of the decision.

D.

Unlike the district courts in *New York*, *California* and *Kansas*, we believe the history of federal legislation regulating airlines demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only. See discussion of remand in relation to Pan Am in Part V, *infra*. From the Civil Aeronautics Act of 1938 until the Deregulation Act of 1978, Congress gave the CAB vast powers of economic regulation over the airline industry, including the regulation of rates, routes and services. See 52 Stat. 973 (1938); 72 Stat. 731 (1958); 92 Stat. 1705 (1978). The Deregulation Act restricted the CAB's authority to regulate some of these areas. In changing the longstanding role of the CAB, Congress acknowledged that these changes could cause confusion concerning federal and state roles in airline regulation. Specifically, the House Committee on Public Works and Transportation observed that the Deregulation Act lacked specific provisions concerning state and federal jurisdiction over airlines, and thereby created "uncertainties and conflicts" in this regard. H.R.Rep. No. 1211 at 15-16; 1978 U.S.Code Cong. & Admin.News at 3751. By

including § 1305 in the Deregulation Act to preempt state regulation of airline routes, rates or services, Congress hoped to "prevent conflicts and inconsistent regulations." H.R.Rep. No. 1211 at 16; 1978 U.S.Code & Cong. & Admin.News at 3752.

Subsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising. Since the enactment of the Deregulation Act, Congress has retained § 1305. Through the Sunset Act of 1984, Congress transferred to DOT the CAB's power to control unfair or deceptive trade practices under § 1381. 49 U.S.C.App. § 1551(b)(1)(E). In so doing, Congress intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. The House Committee on Public Works and Transportation stated that "federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

Given the history of congressional concern and the inclusion of specific preemption language in the Deregulation Act, we agree with the Seventh Circuit in *Illinois Corporate Travel* that airline fare advertising "relates to" rates within the meaning of § 1305(a)(1). Although the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do "relate to" rates when applied to airline fare advertising. As the Supreme

Court noted in *Shaw*, a law relates to a particular subject "if it has a connection with or reference to" that subject. 463 U.S. at 96-97, 103 S.Ct. at 2899-2900. It cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1). Therefore, such state action is expressly preempted by § 1305(a)(1).

The attorneys general remind us that § 1506, which preserves remedies that exist at common law and by state statute, also survived the Sunset Act. They contend that this provision enables them to enforce their states' deceptive advertising laws as an additional remedy to those provided by the Act. However, in a case involving the express preemption of airline services, this court found that § 1305 clearly indicated congressional intent to preempt and controlled over a state law claim submitted under § 1506. *O'Carroll*, 863 F.2d at 13. In the present case involving the advertising of fares by airlines, we follow the reasoning in *O'Carroll* and agree with the Seventh Circuit in *Illinois Corporate Travel*; § 1506 does not preserve state law remedies when there is express preemption under § 1305. See *Hingson*, 743 F.2d at 1416 n. 11.

In summary, we believe it is clear that by enacting §1305 Congress intended to retain in the federal government, exclusive authority over airline advertising of fares. It is not as though Congress had left a vacuum which the states needed to fill in order to protect their citizens. The provisions of the Act under which the CAB regulated unfair or deceptive practices of airlines, particularly § 1381, were neither terminated nor transferred to other agencies; they were transferred by operation of law to DOT. Thus,

DOT inherited the CAB's role under § 1381 with respect to unfair and deceptive practices. With the advent of deregulation and the demise of the CAB, Congress continued to vest authority over such practices in a federal agency. Congress provided for its concern that consumers of airline services be protected under a uniform system of regulation by adding § 1305. This express preemption provision was intended "to prevent conflicts and inconsistent regulations" concerning airline advertising of fares, which relates to rates within the meaning of the provision.

Having concluded that § 1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising, we do not reach the parties' arguments concerning implied preemption.

III.

The attorneys general also argue that the airlines failed to meet the burden of proving the requirements for granting a preliminary injunction and, therefore, the district court abused its discretion by issuing the preliminary injunction against enforcement of the various state laws. As we have indicated, enforcement actions by the states are preempted; thus, the airlines have demonstrated a substantial likelihood of success on their claim for a permanent injunction. Likelihood of success is the first requirement for granting a preliminary injunction. The other three requirements are: (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the one seeking the injunction outweighs any damage it may cause the other party; and (4) that the injunction will not be against the public interest.

Plains Cotton Coop. Ass'n v. Goodpasture Computer Service, 807 F.2d 1256, 1259 (5th Cir.), *cert. denied*, 484 U.S. 821, 108 S.Ct. 80, 98 L.Ed.2d 42 (1987). Under the facts of this case we believe the finding with respect to likelihood of success carries with it a determination that the other three requirements have been satisfied.

Congress has exercised its authority under the Commerce Clause to regulate airlines and by adopting § 1305 has chosen to preempt all enforcement of state laws relating to rates, routes or services of airlines. Congress has declared that it is in the public interest for a federal agency to guard against unfair or deceptive practices by airlines. If the states were permitted to enforce their various laws, the airlines would be subjected to the demands and criteria of numerous legislatures rather than being required to comply only with federal laws and regulations. This would cause irreparable injury by depriving the airlines of a federally created right to have only one regulator in matters pertaining to rates, routes and services. The appellants miss the thrust of the airlines' argument by contending that the only threatened injury is a loss of revenue, which is not irreparable. We conclude that permitting states to regulate airline advertising in the face of the preemption language of § 1305(a)(1) would violate the Supremacy Clause, causing irreparable injury to the airlines. Therefore, the second requirement for an injunction is satisfied.

With regard to the third requirement, there is no injury to the states to weigh against that which they threaten to inflict on the airlines. Since Congress expressly preempted this area of regulation, the states are not injured by the injunction.

Finally, the fourth requirement is satisfied by the finding of Congress that exclusive federal regulation in matters relating to airline rates, routes or services is in the public interest.

We conclude that the airlines met their burden of proving the four requirements and the district court properly issued the preliminary injunction.

IV.

In number 89-1509 the attorneys general of thirty-three states[1] appeal from the order of the district court broadening the preliminary injunction to include them and permitting the airlines to name and serve them as additional defendants in the pending action against the Attorney General of Texas. The Attorney General of Texas also appeals from this order.

A.

A brief outline of the background and participation of these attorneys general in the *TWA v. Mattox* litigation is in order.

In June 1987, as a result of a resolution co-authored by the Attorney General of Texas, the NAAG appointed a task force to study the advertising

---

1 Kansas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

and marketing practices of the airline industry in the United States.

In a letter dated October 19, 1987, DOT informed the Attorney General of California that a number of the proposed NAAG guidelines concerning airline advertising appeared to be preempted by federal law.

In December 1987, the NAAG adopted the guidelines. On February 3, 1988, the attorneys general of Texas and six other states wrote several airlines threatening "protracted litigation" to bring their advertisements into compliance with the guidelines. In a March 2, 1988, letter from DOT to the Attorney General of Texas, DOT stated that state regulation of fare advertising by airlines, as set forth in the guidelines, was preempted by federal law.

On November 14, 1988, the Attorney General of Texas sent a letter to Plaintiffs TWA, Continental and British Air on behalf of the states of California, Massachusetts, New York, Texas and Washington. The letter stated that it was the position of the states that any fuel tax or other surcharge to air fare must be included in the total advertised price. The attorneys general indicated an intent to sue the airlines under their respective state laws.

TWA, Continental and British Air commenced this action against the Attorney General of Texas on January 23, 1989, and moved for a temporary restraining order (TRO). On January 24, 1989, the Attorney General of Texas notified four states of the suit and advised them that the suit could restrict all states from enforcing their laws against airlines. Other states were also informed.

On January 27, 1989, the date of the hearing on the TRO, thirty-three states filed a motion, which reads in pertinent part:

> Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Order
>
> Without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them, the states of Kansas, Alaska, . . . Wyoming specially appear before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order or in the alternative to ask this Court to set a future date upon which to hear plaintiffs' motion as a noticed motion for temporary restraining order.

The attorneys general stated in their motion that they had been "informed" that the airlines were seeking a TRO "that could have the effect of prohibiting such states from enforcing their own laws even though they were not named as defendants nor served by plaintiffs with a copy of the action currently before this Court."

The Attorney General of Kansas then participated in the TRO hearing. After the Assistant Attorney General of Texas had argued against entry of a TRO, the Attorney General of Kansas addressed the court. He stated that he appeared for the purpose of responding on behalf of thirty-four state attorneys general. He argued that the other attorneys general were not responsible for the individual actions of the states of Texas and Kansas under those states' consumer protection laws—attorneys general cannot

act in concert with one another except to the extent their laws are similar. He argued that since each state acted individually to enforce its laws, the states could not be sued collectively "unless there's something that would bring the state under the umbrella of some kind of federal action. And states don't set rates, rules and regulations. . . . The bottom line . . . is that individual states should not be precluded in advance as they consider enforcement of their state law in their state court."

The district court denied motions to stay and on January 30, 1989, issued the preliminary injunction prohibiting the Attorney General of Texas from initiating any enforcement action to regulate the advertising of fares by TWA, Continental or British Air. Attorney General Mattox appealed on February 10, 1989 (No. 89-1142). On February 14, 1989, the Attorney General of Kansas filed a motion to clarify the injunctive order. He requested the court to enter a "Substituted Order," which he attached to the motion. On February 27, 1989, the district court entered an order granting the Kansas motion. It stated:

> The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the State of Texas.

On March 16, 1989, TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who "specially appeared" in the TRO hearing in January. On March

29, 1989, ten additional airlines filed a motion for leave to intervene. Copies of the motions to broaden the preliminary injunction and to permit additional airlines to intervene were sent to the Attorneys General of Texas and Kansas. Neither motion was served on any of the attorneys general of the other thirty-two states.

On April 4, 1989, the Attorney General of Kansas filed a response denying that the district court had subject matter or personal jurisdiction over him.

On April 27, 1989, the district court filed an order broadening the preliminary injunction to include the attorneys general of the other thirty-three states. Also, the court granted the motions of the ten other airlines to intervene as plaintiffs.

The district court noted that since the injunction was issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am.

The district court granted the plaintiffs leave to amend their complaint to include those attorneys general who, acting in concert with Attorney General Mattox or among themselves, were attempting to use state law to enforce the NAAG guidelines relating to airline advertising. This injunction operates prospectively and does not act to interfere with the four cases mentioned above.

B.

Unlike subject matter jurisdiction, jurisdiction over the person can be waived. *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir.1985). The *Cactus Pipe* court adopted the following statement made in *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir.1972), "If a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection." *Cactus Pipe*, 756 F.2d at 1108. In *Rauch v. Day & Night Mfg. Corp.*, the court stated that a court can acquire jurisdiction over a nonresident only by actual service within the jurisdiction *"or by his waiver, by general appearance or otherwise, of the want of due service."* 576 F.2d 697, 700 (6th Cir.1978) (quoting *Goldey v. Morning News*, 156 U.S. 518, 521, 15 S.Ct. 559, 560, 39 L.Ed. 517 (1895)) (emphasis in original).

In the present case the plaintiffs filed suit only against the Attorney General of Texas. Although they sought a TRO against the defendant and "any person in active concert or participation with him," the only relief prayed was from enforcement actions "under the laws of the state of Texas." The complaint and motion for an injunction did not seek to enjoin the enforcement of any laws but those of Texas. The other thirty-three attorneys general joined the Attorney General of Texas in asking the district court to deny the injunction. At that time, they had neither been named defendants nor served with process. They stated that they filed the motion because they had been informed, presumably by the Attorney General of Texas, that the plaintiffs were seeking an

injunction that would interfere with the enforcement of their states' laws.

The record does not support this conclusion. The airlines' motion for a TRO referred to the actions of the NAAG in promulgating the guidelines, but sought relief only against Texas. Nevertheless, the attorneys general of thirty-three other states filed a motion asking the district court to deny the airlines' motion for a TRO against enforcement of Texas laws. Although they described themselves as "specially appearing," the attorneys general sought an affirmative act by the court that would benefit their states. The fact that they sought affirmative relief controls, not the form of their appearance, for the distinction between general and special appearances no longer exists in federal courts. A party may appear generally and yet object to personal jurisdiction at any time before the answer is filed or in the answer. *Grammenos*, 457 F.2d at 1070; Fed.R.Civ.P. 12(h). The thirty-three attorneys general were not parties, however, when they filed their motion. They had no basis for objecting to the court's jurisdiction as they had not been named defendants and no attempt had been made to bring them before the court by process.

It appears to us that the thirty-three attorneys general became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf. At that point it was irrelevant that the thirty-three attorneys general had not been sued or served; they chose to take part in the pending action as if they were parties. True, they did not seek to intervene under Fed.R.Civ.P. 24. On the other hand, they did not appear as amici curiae. Without being required to do so, they came voluntarily into court and joined

with the Attorney General of Texas in seeking dismissal of the injunctive action. The arguments made by the Attorney General of Kansas on behalf of Texas and the other thirty-three states went to the heart of the issue before the district court. We believe the thirty-three attorneys general waived any objection to the jurisdiction of the court over their persons as representatives of their respective states. Thus, we affirm the order broadening the preliminary injunction to include the attorneys general of the thirty-three states and permitting the plaintiffs to amend their complaint to name and serve those attorneys general as additional defendants.

V.

In number 89-1610, the attorneys general of Texas and thirty-three other states appeal from the district court order that permitted the intervention of Pan Am as a plaintiff and broadened the scope of the preliminary injunction to include Pan Am. They argue that the complaint filed against Pan Am in state court by the Attorney General of Texas raised only state law issues and presented no federal question. As a result, the District Court for the Northern District of Texas lacked subject matter jurisdiction and erred in permitting removal, denying the Texas motion to remand to state court and transferring the case to the District Court for the Western District of Texas. They further assert that due to the lack of subject matter jurisdiction, the Western District erred in consolidating this action with that of *TWA v. Mattox*, granting Pan Am's motion to intervene as a plaintiff, and in broadening the preliminary injunction to include Pan Am.

Ordinarily, the existence of a federal question for removal purposes is determined according to the "well-pleaded complaint" rule. Under that rule, removal cannot be based on the existence of a federal defense. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). As the Court noted in *Taylor*, however, Congress may so completely preempt a particular area, that "any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64, 107 S.Ct. at 1546-1547. It has long been recognized that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, has such preemptive force. In *Taylor*, the Court found that ERISA's preemption provision is similarly so strong that every claim for benefits under a covered plan is regarded as arising under the laws of the United States. This determination was based on "the clearly manifested intent of Congress." *Id.* at 67, 107 S.Ct. at 1548.

An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" as to preclude state court actions. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Foundation*, 883 F.2d at 173. Congress made this clear by including the express preemption provision in the Deregulation Act. The legislative history of § 1305 exhibits a

congressional intent to treat a complaint raising "this select group of claims" as "necessarily federal in character." See *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546-1547. The complaint filed against Pan Am in state court by the Attorney General of Texas alleged that Pan Am had violated the Texas Deceptive Trade Practices Act through deceptive advertising of air fares. This claim relates to airline rates within the meaning of § 1305(a)(1) and is federal in character; therefore, we conclude that there is federal question jurisdiction.

In addition, we conclude that the Western District properly permitted Pan Am to intervene as a plaintiff pursuant to Fed.R.Civ.P. 24(b)(2). Pan Am's defense that the enforcement action of the Attorney General of Texas under the Texas Deceptive Trade Practices Act is preempted by §1305(a)(1) presents a question of law in common with that relied upon by the other plaintiff airlines in this case.

Finally, we find that the Western District properly broadened the scope of the preliminary injunction to include Pan Am. However, this injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. Therefore, the preliminary injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

Conclusion

To summarize, we affirm the order of the district court in number 89-1142. The court issued a preliminary injunction that forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, which would seek to regulate the advertising of fares by plaintiffs TWA, Continental and British Air. The court later clarified this injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas.

In addition, we affirm the order of the district court in number 89-1509. Through this order, the court granted the motions of ten other airlines to intervene as plaintiffs. The court also granted plaintiffs TWA, Continental and British Air permission to amend their complaint and to add as defendants the attorneys general of thirty-three other states. And, the court broadened the preliminary injunction to include the attorneys general of the other thirty-three states. This broadened injunction operates prospectively and does not affect similar suits that had been filed by the Attorney General of Texas against Pan Am and the Attorneys General of California, Kansas and New York against TWA.

Finally, we affirm the order of the district court in number 89-1610. The court granted Pan Am's motion to intervene in number 89-1142 and broadened the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The preliminary injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. As a

result, the injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and after careful consideration of the Complaint, Plaintiffs' Motion for and Memorandum in Support of a Temporary Restraining Order, the opposition thereto, and the arguments of counsel, and after notice to and appearance in open Court by the Defendant, the Court finds that Plaintiffs will suffer immediate and irreparable injury if the Attorney General of the State of Texas or parties in concert or participating with him are permitted to bring an enforcement action against Plaintiffs, or any of them, pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any other state law, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other

promotional and informational advertising. The Court finds that it is probable that: Plaintiffs will prevail in establishing their claims that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been preempted by the Federal Government; subsection 2.5 of the NAAG Guidelines, which purportedly requires that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and the threatened enforcement action by Attorney General Mattox and others in concert or participating with him would be in violation of the Supremacy Clause of the United States Constitution. The Court further finds it unnecessary to determine the probability that the Plaintiffs will demonstrate that the threatened implementation or enforcement of the NAAG Guidelines through state law, including enforcement of the Guidelines by Attorney General Mattox through Tex. Bus. & Comm. Code §§17.41 et seq., or others in concert or participating with him through their respective state statutes, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the Constitutional prohibition against interstate compacts that intrude into the federal domain (Art. 1, §10, cl. 3, U.S. Constitution); and violates Plaintiffs' First Amendment rights. In addition, the Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendant and would, in fact, be in the public interest. Accordingly,

It is hereby ORDERED that Plaintiffs' Motion for Preliminary Injunction be and hereby is GRANTED.

It is further ORDERED that the Attorney

General of the State of Texas, Jim Mattox, individually and in his official capacity, and all other persons acting for the Attorney General in either capacity, and all other persons acting in concert or participation with Attorney General Mattox or on his behalf, and all other persons having actual knowledge of this Order, be and hereby are ENJOINED from:

> initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services.

It is further ORDERED that Plaintiffs shall give security in the amount of $10,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the Court or by the Clerk of the Court.

SIGNED this 30th day of January, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TRANS WORLD AIRLINES, INC.,CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	NO.A-89-CA-067

ORDER

Came on this date to be considered the motion of the Honorable Robert T. Stephan, Attorney General of the State of Kansas, to clarify and substitute this Court's Order granting a preliminary injunction in the above-styled and numbered case. The Court, having reviewed the motion, is of the opinion it is meritorious and should be granted. It is therefore,

ORDERED that the Motion to Clarify and Substitute filed by the Attorney General of the State of Kansas be and hereby is GRANTED. The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any other than the laws of the State of Texas.

SIGNED this 23rd day of February, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Came on to be considered in the above-styled cause the Motion of Certain Air Carriers for Leave to Intervene and Plaintiffs' Motion to Broaden the Injunction issued by this Court. The Court, having reviewed both motions and the responses thereto, has determined that both motions are meritorious and should be granted.

This suit was originally filed by Plaintiffs Trans World Airlines, Inc., ("TWA"), Continental Airlines, Inc., ("Continental"), and British Airways PLC ("British Airways") against Jim Mattox, the Attorney General of the State of Texas. The Plaintiffs seek injunctive and declaratory relief, based upon the Attorney General's attempt to file suit against the airlines under the Texas deceptive trade practices act. The dispute centers around the advertising practices

of the airlines, which the Attorney General claims are violative of Texas law. The airlines claim this issue has been preempted by federal law.

The original injunction issued by this Court protected only the named Plaintiffs against actions brought by the Attorney General of Texas under Texas law which regulate or restrict air fare advertising or operations involving rates, routes and/or services.

Since the injunction was issued by this Court on January 30, 1989, the Attorneys General of California, Kansas and New York have filed suit against Plaintiff TWA on the same grounds--seeking to force the airline to comply with state advertising regulations. Attorney General Mattox has filed suit on identical grounds in the 101st District Court of Dallas County, Texas against Pan American World Airways, Inc. ("Pan Am"), which has also requested leave to intervene in the present action.

Attorney General Mattox, not satisfied with attempting to regulate domestic air carriers, has also threatened legal action against foreign air carriers, including Lufthansa German Airlines ("Lufthansa"). The letter from Attorney General Mattox which threatens enforcement against Lufthansa also purports to be sent on behalf of the States of California, Massachusetts, New York, and Washington. As a result of these threats, Lufthansa, along with Air Canada, Compagnie National Air France ("Air France"), Alitalia-Lines Aeree Italiane, S.P.A. ("Alitalia"), El Al Israel Airlines, Ltd., ("El Al"), Finnair, Japan Air Lines Company, Ltd., ("JAL"), Qantas Airways, Ltd., ("Qantas"), Scandinavian Airlines System ("SAS"), and Viacao Aerea Rio-Grandense ("Varig"), have requested leave to intervene.

In addition, the Plaintiffs to this action request

the Court to broaden its injunction to include the thirty-three states who have "specially appeared" in this action.

I. Motion to Intervene by Foreign Air Carriers

A. Intervention as a Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is undisputed that no statute confers an unlimited right to intervene in this action. As such, the parties must meet the requirements for intervention of right under 24(a)(2), which requires the following:

(1) the application for intervention must be timely;
(2) the applicant must have an interest relating to the property or transaction which is the subject of this action;
(3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;
(4) the applicant's interest must be inadequately represented by the existing parties to the suit.

New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452, 463 (5th Cir. 1984) (en banc), citing International Tank Terminals, Ltd. v. M/V Acadia Forest, 579 F.2d 964, 967 (5th Cir. 1978).

1. Timeliness

Timeliness of intervention is determined from a review of all the circumstances. NAACP v. New York, 413 U.S. 345 (1973). The Fifth Circuit has established four factors to be considered by the Court in determining the timeliness of a petition for leave to intervene:

> Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
> Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Lelsz v. Kavanaugh, 710 F.2d 1040, 1043 (5th Cir. 1983).

In the present action, the petition for leave to intervene was filed only two months after the main suit was filed, and only three months after Lufthansa learned of the threatened legal action by Attorney General Mattox. Although not specifically outlined

in the Intervenor's response, the Court finds that there was no significant delay between the time the Intervenors knew or reasonably should have known of their interest in the suit and the time the petition for leave to intervene was actually filed. As such, the Intervenor's petition is timely.

Even if a two-to-three month delay is considered not timely, the existing parties will suffer no prejudice for failure of the Intervenors' to file their petition earlier. There are no existing suits filed against the Intervening parties, nor does their intervention in any way limit any existing rights of the Attorney General of the State of Texas. There is no evidence of any potential prejudice to the existing parties to the litigation.

On the other hand, the Intervenors will suffer great prejudice if not allowed to intervene. Attorney General Mattox has threatened suit against Lufthansa and could initiate suit against any of the other Intervenors at any time. The Intervenors are faced with great prejudice if not allowed to intervene.

Critical to this inquiry is adequacy of representation. See Lelsz v. Kavanaugh, 710 F.2d 1040 (5th Cir. 1983). "If the proposed intervenors' interests are adequately represented, then the prejudice from keeping them out will be slight." Id. at 1046. Here, the proposed intervenors' interests are not adequately represented. The proposed intervenors raise issues similar, but not identical to, those raised by the Plaintiffs. The laws related to foreign air carriers involve issues not pertinent to domestic air carriers.

As to Factor 4, there have been identified no unusual circumstances militating against a determination that the petition is timely. After a review of the facts as related to the above factors, the Court determines that the Intervenor's petition for Leave to Intervene was timely filed.

2. Interest

The Intervenor must demonstrate an "interest relating to the property or transaction which is the subject of the action." Rule 24(a)(2). An applicant for intervention need not be legally bound by the result of the main case, nor need his interest be identical to those claims asserted in the main action. New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452 (5th Cir. 1984) (en banc). However, intervention of right does require a "direct, substantial, legally protectable interest in the proceedings." Id. at 463.

The Intervenors have exhibited such an interest in the present proceedings. If not permitted to intervene, they will be exposed to suit on grounds prohibited by the injunction issued by this Court. Further, the claims presented by the foreign air carriers, although not identical to those presented by the Plaintiffs in this suit, are sufficiently similar to establish a direct and substantial interest in these proceedings.

3. Protection of Interest

This third factor requires the applicant to establish that the disposition of the main action may impair or impede his ability to protect his interest in the subject matter of the action, which is demonstrated by the possibility of suit being filed against the prospective intervenors if not brought under the protection of this Court's injunction.

4. Adequacy of Representation

Finally, as stated previously, the Court has determined that the existing parties to the suit will not adequately represent the interests of the proposed intervenors. The specific issue as to whether an action can be brought under state law to regulate the advertising practices of a foreign air carrier will not be presented absent grant of leave to intervene.

B. Permissive Intervention

Even if intervention as of right under 24(a) is not mandated, then permissive intervention should be granted under Rule 24(b). This Rule provides:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties.

The proposed intervenors have established the existence of a question of law in common with those presented in the main action – specifically whether federal law preempts in the area of regulation of airline advertising. The main issue which prevents the intervenors' rights from being adequately represented by the Plaintiffs is the fact that the intervenors are foreign rather than domestic air carriers. Although federal law is substantially similar as it applies to both classes of air carriers, there are differences which will not be addressed absent intervention by the foreign air carriers.

In light of the preceding, the Motion of Certain Air Carriers for Leave to Intervene is **GRANTED**.

II. Motion to Broaden Injunction

The Plaintiffs seek to broaden the scope of the injunction issued by this Court on three grounds:

1) the evidence that other state attorneys general are acting "in concert" with Attorney General Mattox;
2) the attorneys general of thirty-three states have de facto intervened in this proceeding; and
3) the actions taken by various state attorneys general since this Court's preliminary injunction order threatens the Plaintiffs and this Court's jurisdiction.

Since this Court issued its preliminary injunction order, four additional suits have been filed against two air lines under other state laws in an attempt to regulate the airlines' advertising of their rates, routes and services:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.
2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.
3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.
4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

In light of these developments and upon further consideration of the issues in this action, the Court has determined that the injunction presently in effect must be broadened in order to provide meaningful protection to the Plaintiff airlines. The suits initiated in other states on identical grounds and against the same parties demonstrate to the Court that this matter is not merely of local interest, but rather one that is of nationwide concern. Decisions made in the course of these proceedings

have the potential of effecting broad-sweeping changes in the airline industry.

The scope of this matter, clearly, is not limited to the activities of the Attorney General of Texas, but includes all Attorneys General involved in enforcing the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"). Therefore, the Court's injunction will be broadened to include not only Attorney General Mattox, but those State Attorneys General, acting in concert with Attorney General Mattox, or with each other, to enforce the NAAG guidelines through state law actions.

Failure to include these additional Defendants will seriously impair the ability of this Court to render a meaningful decision over the issue of whether federal law preempts state action in the matter of airline advertising. There is also a real possibility that the Plaintiff airlines will be subjected to a multiplicity of suits in various jurisdictions, thereby depriving this Court of the ability to offer any meaningful protection to the Plaintiffs. Despite the Plaintiffs' assertions that the additional Attorneys General be deemed intervenors, the Court has determined that the proper method of joinder is through Federal Rule of Civil Procedure 19.

Accordingly, it is **ORDERED** that Plaintiffs are hereby **GRANTED** leave to amend their complaint to include those Attorneys General who, acting in concert with Attorney General Mattox or among themselves, are attempting to use state law to enforce the NAAG guidelines relating to airline advertising within ten (10) days from the entry of this Order.

Prior to the addition of said Defendants as parties to this action, the Court's injunction will be broadened to include the following:

Hon. Grace Berg Schaible
Attorney General of Alaska

Hon. Robert K. Corbin
Attorney General of Arizona

Hon. Steve Clark
Attorney General of Arkansas

Hon. John Van De Kamp
Attorney General of California

Hon. Duane Woodward
Attorney General of Colorado

Hon. Clarine Nardi Riddle
Deputy Attorney General
(Acting Attorney General of Connecticut)

Hon. Robert Butterworth
Attorney General of Florida

Hon. Jim Jones
Attorney General of Idaho

Hon. Neil F. Hartigan
Attorney General of Illinois

Hon. Tom Miller
Attorney General of Iowa

Hon. Robert T. Stephan
Attorney General of Kansas

Hon. James E. Tierney
Attorney General of Maine

Hon. J. Joseph Curran, Jr.
Attorney General of Maryland

Hon. James M. Shannon
Attorney General of Massachusetts

Hon. Frank J. Kelley
Attorney General of Michigan

Hon. Hubert H. Humphrey, III
Attorney General of Minnesota

Hon. William L. Webster
Attorney General of Missouri

Hon. Robert M. Spire
Attorney General of Nebraska

Hon. Brian McKay
Attorney General of Nevada

Hon. Robert Abrams
Attorney General of New York

Hon. Lacy Thornberg
Attorney General of North Carolina

Hon. Nicholas Spaeth
Attorney General of North Dakota

Hon. Anthony J. Celebrezze, Jr.
Attorney General of Ohio

Hon. Robert Henry
Attorney General of Oklahoma

Hon. Dave Frohnmayer
Attorney General of Oregon

Hon. James E. O'Neil
Attorney General of Rhode Island

Hon. Roger Tellinghuisen
Attorney General of South Dakota

Hon. Charles W. Burson
Attorney General of Tennessee

Hon. Jeffrey Amestoy
Attorney General of Vermont

Hon. Kenneth O. Eikenberry
Attorney General of Washington

Hon. Charles G. Brown
Attorney General of West Virginia

Hon. Don J. Hanaway
Attorney General of Wisconsin

Hon. Joseph B. Meyer
Attorney General of Wyoming

The Court has determined that each of the above has an interest relating to the subject of this action and are so situated that the disposition of this action in their absence will leave those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Federal Rule of Civil Procedure 19(a)(2)(ii).

This injunction will operate prospectively only and will not act to interfere with the following proceedings:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.

2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.

3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.

4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

The Court would hope that, considering the possibility of conflicting judgments in this case, these state court proceedings would be abated pending this Court's final determination of this matter.

IT IS SO ORDERED.

SIGNED this 26th day of April, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, et al. Defendant.	§	

ORDER

Came on this date to be considered the Motion of Pan American World Airways, Inc. ("Pan Am") for Leave to Intervene in the above-styled cause. The action pending against Pan Am in the United States District Court for the Northern District of Texas, Dallas Division, has been transferred to this Court and consolidated with the present action. The Court, therefore, has determined that the Motion to Intervene should be granted pursuant to Rule 24(b)(2), and that the protective order issued by this Court be broadened to include Pan Am.

IT IS SO ORDERED.

SIGNED this 26th day of May, 1989.

/s/ Walter S. Smith,Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE